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IN THE

Supreme Court of the United States

October Term, 1968

No. 252

STUYVESANT INSURANCE COMPANY,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No.

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN WESLEY EGAN and BRYAN JOHN HILL,

Defendants,

On intervention of

STUYVESANT INSURANCE COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner, Stuyvesant Insurance Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against it in the above entitled case on May 29, 1968.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not yet been officially reported. The opinion of Honorable Irving Ben Cooper, United States District Court Judge, is

attached to the appendix of the original brief filed by the defendants-appellants and in appendix A annexed to the petition of Stuyvesant Insurance Company, filed herewith.

B. Jurisdiction

The judgment of the Court of Appeals was entered on April 24, 1968, and the application for rehearing en banc was denied on May 29, 1968. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Can the Government rightfully deprive petitioner of its property without due process of law?

2. Can the Government unilaterally state that they do not intend to prosecute a particular indictment and then argue in the alternative that they can still collect the forfeited bond under that indictment?

3. Can the Government enlarge the terms of the surety's undertaking without the surety's written consent?

4. Is an arrest by one government agency a harassment and confinement which would automatically exonerate the bond if the defendant is in custody at the time a bond should have been re-written?

5. Can the Court rightfully impose a burden upon defense counsel to inform the surety company of the change

in conditions when defense counsel is not privy to the contract written between the Government and insurance company?

D. United States Constitution and the Statutes

United States Constitution, Fourteenth Amendment.

United States Constitution, Sixth Amendment.

The statutes involved are: Federal Rules of Criminal Procedure, Rule 46.

E. Summary Statement of Matters Involved

On or about January 13, 1967, defendants John Wesley Egan and Bryan John Hill were arrested in Miami, Florida, and arraigned before the Court pursuant to a complaint filed in the Southern District of New York, charging each of them with allegedly conspiring to violate the Federal Narcotic Laws (21 U.S.C. 174). The defendants contested the complaint and demanded a removal hearing in Florida. The complaint naming these defendants also named several other defendants, many who were arrested in New York. The defendants were never afforded a removal hearing in Florida as the Government elected to file indictment number 67 Cr. 72 in the Southern District of New York on January 25, 1967, naming only Egan and Hill. It can be interpreted that this indictment was obtained solely for the purpose of preventing the defendants from getting a removal hearing. Bail was originally set in the sum of $100,000.00 and reduced to $25,000.00 by Judge Choate in Florida prior to the defendants being removed to the Southern Dis-

trict of New York. On February 6, 1967, a motion was made on behalf of the defendant Egan and later adopted by the defendant Hill for an immediate and speedy trial on indictment 67 Cr. 72. An additional application was made jointly on behalf of both defendants for a reduction of bail. The issue of a speedy trial* on this indictment was postponed many times over objection during the February Term, upon representation of the Assistant United States Attorneys William Tendy and Paul Rooney that they would attempt to obtain a superseding indictment (minutes of Feb. 20, 1967, pages 18-19). Bail was subsequently reduced by the Court on February 20, 1967, to $15,000.00 as to each defendant (minutes of March 3, 1967, pages 37, 42). On February 21, 1967, the defendant Hill was released on bond in this sum after specific conditions were imposed prior to the writing and acceptance of this bond. These conditions were made a part of the bond as a rider attached thereto and were signed by the defendant Hill and the surety company. Included in these conditions were the fact that Hill was compelled to report to the office of the United States Marshal every day including Sundays and holidays. On March 7, 1967, the Stuyvesant Insurance Company issued a bond for John Wesley Egan in the sum of $12,500.00 where the same conditions were imposed and accepted.

The conditions imposed under indictment 67 Cr. 72 were never altered while that indictment remained in full force and effect. On March 17, 1967, indictment 67 Cr. 196 was filed, naming Hill, Egan and several others as defendants. Bench warrants were issued but were never executed on Hill

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* The defendants' motion for a speedy trial was paradoxically denied by Judge Cannella after they had absconded.

and Egan and on March 20, 1967, the bench warrants were ordered vacated.[1] On March 21, 1967, Egan and Hill were taken into custody and placed in the Federal House of Detention by agents of the Immigration and Naturalization Service. The arrest occurred in the Office of the United States Marshal where they reported pursuant to the conditions imposed under 67 Cr. 72.[2] On March 23, 1967, Egan and Hill appeared in the United States District Court, Southern District of New York, before Judge Dudley B. Bonsal. Indictment number 67 Cr. 72 was marked off the calendar and superseded[3] by indictment 67 Cr. 196. The defendants were arraigned. A review of the Court docket sheets will indicate that Hill and Egan were not brought over from Immigration by any writ of habeas corpus ad prosecutem. It is also conceded that Egan was requested to appear again on March 24, 1967, so that the dispute concerning his representation by counsel could be ascertained. It should be conceded that on March 24, 1967, Egan did appear and that he was actually in custody on both March 23rd and March 24th, 1967. The docket sheets on indictment 67 Cr. 196 will also show that the bond should have been rewritten and there is no dispute that the bond was not rewritten under 67 Cr. 196. On May 22, 1967, an oral application was made to the Court on behalf of the defend-

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[1] Taken from docket entries in Clerk's office.

[2] Detention statements are annexed to the appendix as exhibits . . . and . . .

[3] The American College Dictionary defines "supersede" as follows: 1) To replace in power, authority, effectiveness, acceptance, use, etc., as by another person or thing. 2) To set aside, as void, useless or obsolete, now usually in favor of something mentioned. 3) To displace in office or promotion by another. 4) To succeed to the position, function, office, etc., of; supplant.

ants Hill and Egan for a relaxation of their bail limits.* This application was made when the case was called on indictment 67 Cr. 196 and was granted by Judge Cannella. The docket sheets reflect that he allowed them to report to the United States Marshal every ten days rather than once a day. There are no entries on the docket sheets for 67 Cr. 72 which show any alteration of the original bail conditions. There should also not be any dispute that after May 22, 1967, and after the defendants reported to the Marshal every ten days, instead of every day. There is also no dispute that there was no Court order signed, entered or docketed which was consented to by the surety company for any extension of these bail limits. On July 14, 1967, the United States Attorney notified the attorneys for the defendants and the surety that he suspected Egan and Hill had absconded and the case was placed on the calendar under indictment 67 Cr. 196 for July 17, 1967. The bond under 67 Cr. 196 was then ordered forfeited on July 20, 1967. Counsel for the defendant Hill immediately informed the Court of the surety's position on the bonds. Judge Bonsal only ordered the forfeiture of 67 Cr. 196, if this bond were in effect. When the United States Attorney realized that there was no bond, he recalled 67 Cr. 72 to the calendar.

F. Reasons for Granting Writ

POINT I

The United States Circuit Court for the Second Circuit, by denying relief to petitioner in the case at bar, effectively

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* Hill was represented by Joseph I. Stone Esq. Egan was represented by Gilbert S. Rosenthal Esq.

violates this Court's decision in *Stack* v. *Boyle*, 342 U.S. 1, and deprives petitioner of its property ($27,500.00) by not affording it an evidentiary hearing and accepting certain assumptions which were factually incorrect in arriving at a legal decision. The assumptions which were accepted by the trial court and the Circuit Court of Appeals which were incorrect and which the Circuit Court did not attempt to correct were as follows:

(a) The trial court felt that the defendants absconded on or about June 19, 1967. This was incorrect and was never corrected in either court's decision.

(b) The trial court assumed that because the same attorney appeared for the insurance company on petition and appeal that this attorney *absolutely* made the petitioner aware of all the defendants' movements or changes in bond conditions when at the time of the change in the bond conditions, this attorney did not represent the petitioner insurance company.

(c) Both courts assumed that the surety "however, apparently knew of and acquiesced in the change of the interval for reporting, and although more than a month and a half elapsed during which Stuyvesant could have required the defendants to report daily to itself as surety, it did not do so."

(d) The Circuit Court of Appeals stated that "Attorney Stone spoke in Court on behalf of Stuyvesant on March 3, 1967, at a hearing before Judge Weinfeld." The Circuit Court refused to grant a re-hearing to correct this erroneous interpretation.

The only way petitioner could have safeguarded his property was to obtain the requested evidentiary hearing. Both

courts could then have relied on sworn testimony, rather than "assumptions." Failure to afford petitioner an evidentiary hearing was in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

POINT II

On March 23, 1967, the bailbonds under 67 Cr. 72 should have been declared exonerated. The government asked that this indictment be "marked off the calendar." The government stated: "This indictment will not be tried." The Government and defendants then appeared to answer the superceding indictment, 67 Cr. 196.

The government, *not* the surety caused the defendants to be placed on liberty after March 23, 1967.

The government should not be permitted to take petitioner's property if the government is wholly or partially responsible for allowing Egan and Hill to have been released on an unwritten and void bond.

POINT III

"Bailbonds in criminal cases are contracts which are strictly construed in accordance with their terms and ordinarily all substantial procedural requirements must be complied with before the Court can duly render them forfeited and enter judgment", *Dudley* v. *U.S.*, 242 F. 2d 656; *U.S.* v. *Foster*, 278 F. 2d 567. If the Court enlarges the bail, the surety must be privy to the Court's ruling and bailbonds are strictly construed in favor of the surety, *Swanson* v.

U.S., 224 F. 2d 795. An invalid bond is not binding on either the principal nor the surety, *U.S.* v. *Hudson*, 65 F. 168.

The surety on a bailbond can be held liable only within the absolute terms of its undertakings which cannot be enlarged, *Ewing* v. *U.S.*, 240 F. 241. Judge Cannella's enlargement of the bail conditions, which were acted upon by the Government and the defendants, was not known to the surety company and not reflected in any way as applying to 67 Cr. 72.[5] Because of these enlarged conditions, the defendants had a better chance of absconding, in fact did abscond, and now the Government wants the surety to be equally as liable as if the surety consented to the enlarged conditions or was willing to write a bond in the absence of these conditions. "Consent of surety needed for change in travel restrictions", *U.S.* v. *Foster*, 79 F. Supp. 422. The affidavit of Raymond Robin, attorney in fact for the Stuyvesant Insurance Company, clearly indicated that he was aware of the conditions when he originally wrote the bond for Hill and also states that he would not have written the bond for Egan had not these conditions been prevalent. The Government cannot say at this stage of the proceedings that the surety company wrote the bonds and was aware of the enlarged conditions. No recovery should be had upon such a bond except upon a clear showing of liability under its express conditions, *U.S.* v. *Eisner*, 323 F. 2d 38.

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[5] Docket entries, Exhibits A and A[1].

POINT IV

The Supreme Court of the United States in *Stack* v. *Boyle, supra,* stated:

> "The purpose of a bailbond is, of course, to secure the presence of a defendant to answer the charge or charges against him and to respond to the judgment of the Court and at the same time afford freedom from harassment and confinement before proven guilty of the charge."

A certain amount of harassment is presumed from the undisputed record. However, the petitioners were prevented from showing to what degree this harassment occurred.

In *Romero* v. *United States,* 374 F. 2d 620, the Court refused to remit a portion of the forfeited bond. However, they noted that the defendant's absence was not because of an act for which the United States Government was responsible.

POINT V

A defense attorney is not a surety for the defendant he represents. A bailbond is a contract between the government, the surety and the defendant. The defense attorney is neither an agent of the surety, even if he recommends the defendant to the surety, nor is he always the defendant's agent. For the Court to increase an attorney's obligation to a third party would be contrary to the attorney-client relationship. It would also compel the third party to be liable for an attorney's acts when he didn't choose the attorney, therefore depriving him (in this case, the surety) of his Sixth Amendment rights.

CONCLUSION

The petition for certiorari should be granted and this court in the exercise of its power should order the judgment reversed.

Respectfully submitted,

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APPENDIX

Decision of United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Cr. 72 and 67 Cr. 196

UNITED STATES OF AMERICA

—against—

JOHN WESLEY EGAN and
BRYAN JOHN HILL,

Defendants,

On intervention of
STUYVESANT INSURANCE COMPANY,

The defendants absconded since June 19, 1967 and now remain at large. This motion seeks an order declaring null and void the bail bonds written by the Stuyvesant Insurance Company on the indictments here involved. Application denied.

The superseding indictment 67 Cr. 196 filed March 17, 1967 merely added defendants additional to Egan and Hill; the charge was the same (conspiracy to import (156) narcotics into the United States) as contained in the original indictment 67 Cr. 72 filed January 25, 1967. Despite Judge Bonsal's order of March 23, 1967 directing the rewriting of the bonds to cover the superseding indictment and Mr. Stone's (presently appearing for Stuyvesant) assurance that he was "agreeable" to having the original bonds so rewritten, this was not done. Movant does not assert that it

was not on notice at or about the time of Judge Bonsal's order. At no time did it move either to surrender defendants or ask to be relieved of its obligations under the bonds. Irrespective thereof, we fail to see how the filing of the superseding indictment enlarged in the least the risk of the surety's undertaking.

As to the episode relating to the arrest of Egan and Hill by agents of the Immigration and Naturalization Service: All the reasons and conclusions assigned in the paragraph immediately preceding hereof constitute our response to the assertion that this event too exonerated Stuyvesant of its responsibility.

(157) At first blush it would appear that exoneration did take place when Judge Cannella by order of May 22, 1967 allowed defendants to report to the office of the United States Marshal in this District once every ten days instead of every day as provided in the original bond covering 67 Cr. 72. While Stuyvesant did not sign a written consent thereto at the time, it acquiesced in the new arrangement concerning reporting by defendants, for it was on notice and failed to take affirmative action to be relieved of its obligation. It regarded the bonds binding as late as almost a month after Judge Cannella's order, for it refused to consent to Mr. Stone's application on June 19, 1967 made in open Court for permission to allow Hill to work in Mr. Stone's garden in Long Island (while Judge Mansfield so ordered upon appropriate conditions, the order was not carried out and proved abortive). We are inclined to agree with the observation in the opposing affidavit of the Assistant United States Attorney (p. 6):

> "This statement [the bondsman's refusal to consent to Mr. Stone's request for enlargement of the bond limits affecting Hill to include Long Island] would seem completely inconsistent with his prior position that he believed the bond to have been exonerated back in March."

(158) Here again Stuyvesant made no move to surrender defendants or ask to be exonerated. We observe in passing that Judge Cannella's order did not enlarge the bail limits whatever.

We must bear in mind that the Criminal Calendar Part is heavily laden constantly. Generally speaking, bond applications are speedily made and disposed of. Neither time or facilities exist there for a running communication between court and surety. The latter are aware of all this. They are under the strict obligation at all times to be diligent and vigilant whenever they know, or reasonably should know, of possible impairment to their commitments. We are not confronted here with a clear enlargement of the bond either without notice or made with insufficient time to the surety to protect itself adequately.

From what is here revealed, we find that movant does not distinctly and unequivocally aver that it was not on notice within a reasonable time of each and every court order made prior to the disappearance of defendants. Nowhere does it deny complete failure to surrender them or move for exoneration. Rule 46(g) Federal Rules of Criminal Procedure.

(159) The Government did not impair the bond obligation. By inaction movant acquiesced in what here took place.

Motion as to 67 Cr. 72 denied in all respects.

This shall be considered an order; settlement thereof is unnecessary.

So Ordered:

New York, N. Y.
November 6, 1967

Irving Ben Cooper
United States District Judge

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OCTOBER TERM, 1968

No. 252

STUYVESANT INSURANCE COMPANY,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Opinion of United States Court of Appeals)

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32 CASE PRESS INC.; 421 HUDSON ST., N.Y.—OREGON 5-4540

Opinion of United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 349 and 350—September Term, 1967.
(Argued March 12, 1968 Decided April 24, 1968.)

Docket Nos. 31960 and 31961

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN WESLEY EGAN and BRYAN JOHN HILL,

Defendants,

and

STUYVESANT INSURANCE COMPANY,

Appellant.

Before:

LUMBARD, *Chief Judge,*
ANDERSON, *Circuit Judge,* and
BLUMENFELD, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* denying appellant's motion to set aside forfeitures of bail. Affirmed.

LARS I. KULLESEID, Assistant U. S. Attorney, Southern District of New York (Robert M. Morgenthau, U. S. Attorney, and Frank

* Of the District of Connecticut, sitting by designation.

M. Tuerkheimer, Assistant U. S. Attorney, Southern District of New York, on the brief), *for Appellee.*

Joseph I. Stone, Esq., New York, N. Y. (Stone & Diller, New York, N. Y., on the brief), *for Appellant.*

Anderson, *Circuit Judge*:

Following the filing of a complaint against them in the Southern District of New York, John W. Egan and Bryan J. Hill, Australian nationals, were arrested in Miami, Florida, on January 13, 1967. They were indicted in the United States District Court for the Southern District of New York on January 25, 1967 (indictment number 67 Cr. 72) for conspiring with others, named but not made co-defendants, to violate Title 21 U. S. C. §173 and §174 of the federal narcotics laws. Both accused, then represented by Attorney Joseph I. Stone, pleaded not guilty. Their bail had been fixed at $20,000 each. Subsequently on February 20, 1967 Hill's bail was reduced to $15,000 and it was furnished the next day with Stuyvesant Insurance Company (Stuyvesant) as surety. Egan's bail was reduced to $12,500 on March 3, 1967 and it was posted on that day with the same surety. The bail bonds were in standard form[1] and to each was attached a rider containing specific restrictions[2] imposed by Judge McGohey.

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[1] The principal pertinent condition of each of the bonds was "that the defendant ..... is to appear before ....., United States Commissioner for the ..... District of ....., at ....., and in the United States

On March 17, 1967 a superseding indictment (67 Cr. 196) was filed charging the defendants with the identical offense as that charged in 67 Cr. 72 except that in 67 Cr. 196 ten other defendants were similarly charged, four of whom had simply been named as co-conspirators in 67 Cr. 72, and except that additional overt acts were alleged. On March 21, 1967 Egan and Hill were arrested by the Immigration authorities and remained in jail until each was released on a $5,000 bond furnished by Stuyvesant, Egan on March 28 and Hill on April 4. On March 23 when they were still in custody, the marshal presented them before Judge Bonsal and they pleaded not guilty to Indictment 67 Cr. 196. Judge Bonsal granted their applications to have the motions filed in Indictment 67 Cr. 72 apply to Indictment 67 Cr. 196. He further set bail in the same amounts as in Indictment 67 Cr. 72, which he marked "off the calendar," and ordered that the original bail bonds be rewritten to cover both 67 Cr. 72 and the superseding indictment. Attorney Stone agreed before Judge Bonsal

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District Court for the ..... District of ..... at ....., and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the commissioner or by the United States District Court for the ..... District of ....."

[2] "1. The defendant shall surrender all passports.

"2. The defendant shall stay away from all airlines, airline offices, airports, airline terminals, bus terminals, train stations, depots, docks, all consulates, except that of Australia, car rental agencies and travel agencies.

"3. The defendant shall report to the U. S. Marshall for the Southern District of New York at 10:30 A.M. every morning [in the case of Hill and 11:30 A.M. in the case of Egan].

"4. The defendant is limited to the Borough of Manhattan."

in open court to take care of having the bonds rewritten but he never did anything about them and they never were rewritten.

On April 5 other counsel appeared for Egan but Attorney Stone continued to represent Hill.[3] On May 22, the accuseds' motions to have the order, which required them to report to the marshal every day, modified so that they would report every ten days was granted by Judge Cannella. On June 19, Hill moved for leave to extend the bail limits to include Attorney Stone's residence on Long Island. This motion was granted by Judge Mansfield although Hill never actually took advantage of the extension.[4] The defendants reported to the marshal for the last time on July 10, 1967 and they failed to appear as ordered on July 14 when their trial on 67 Cr. 196 was to be held. The defendants had absconded. On July 20 the bonds were called in the District Court and Judge Bonsal ordered the bail forfeited on Indictment 67 Cr. 196. It was then discovered that Attorney Stone had failed to have the bonds rewritten and the Government later moved for the forfeiture of the bail on Indictment 67 Cr. 72. Judge Cooper ordered the forfeiture on July 28. The surety, Stuyvesant,

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[3] Mr. Stone represented both Egan and Hill during the early months of the case and at least until the filing of the superseding indictment. On April 5, 1967, other cousel filed a notice of appearance on behalf of Egan and Mr. Stone continued to represent Hill until that accused absconded. On March 23, 1967, Egan represented to Judge Bonsal that he had no attorney at that time and Mr. Stone consented to represent Egan so far as the proceeding that morning was concerned.

[4] Stuyvesant does not contend on this appeal that its obligation was cancelled by Judge Mansfield's order proposing an enlargement of Hill's bail limits.

represented by Attorney Stone moved to set aside the forfeiture but Judge Cooper denied the motion on November 6, 1967. It is from this ruling that Stuyvesant has appealed. We affirm.

The appellant argues that its obligation as surety was exonerated as a matter of law when the defendants were taken into custody by the Immigration and Naturalization Service on March 21, 1967, and that it was relieved of any obligation on the bail bonds because it did not consent to the relaxation of the defendants' obligation to report from every day to every ten days as granted by Judge Cannella.[5]

The arrest of the defendants by the Immigration and Naturalization Service did not *ipso facto* operate as a discharge of the surety's obligation as a matter of law. The appellant relies on the general proposition that bail will

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5 Appellant does not press its argument that the mere filing of the superseding indictment exonerated the bail on Indictment 67 Cr. 72. While it has been stated that a "discontinuance of the cause" will operate to exonerate bail for appearance, see *United States* v. *Blender,* 41 F. Supp. 257 (N. D. Ill. 1941), "[a] continuance or postponement of the case will not discharge bail unless it places a burden on them [sureties] which they did not agree to assume . . . ." 8 C. J. S. *Bail* §78. Here, the filing of the superseding indictment and the marking of the superseded indictment "off the calendar" did not in any way amount to a "discontinuance" of the cause nor did it impose upon the surety an additional risk or burden, exonerating the bail. *Western Surety Co.* v. *United States,* 72 F. 2d 457, 459 (9 Cir. 1934). Indictment 67 Cr. 72 was merely marked off the trial calendar and preference was given to Indictment 67 Cr. 196; it was still on the docket. The decisions holding bail exonerated involved acts indicating "an intention to abandon the prosecution," *United States* v. *Blender, supra,* while here the "cause" enunciated in Indictment 67 Cr. 72 was, as noted above, identical to that set forth in Indictment 67 Cr. 196. The superseded indictment was never dismissed, and the filing of the superseding indictment 67 Cr. 196 did not bar the forfeiture of bail on Indictment 67 Cr. 72.

not be forfeited where performance of a condition of the bond is rendered impossible by an act of God, the public enemy, the obligee, or the law. *Taylor* v. *Taintor*, 83 U. S. 366 (1873); 8 C. J. S. *Bail* §76. It contends that when defendants Egan and Hill were held in custody, they were placed beyond the jurisdiction of the bondsman, so that its performance was rendered impossible. Had the surety been called upon to produce the defendants while they were incarcerated in connection with the Immigration charge and could not do so because of their imprisonment, its claim might have some merit. As it is, however, the defendants had long since been released and had reported to the marshal many times before they absconded. The conditions of their bonds were not made impossible by their brief sojourn in jail and the surety had ample opportunity to surrender the defendants between their release from jail and the time they actually ran off. *United States* v. *Carolina Casualty Insurance Co.*, 237 F. 2d 451 (7 Cir. 1956). The failure of the accused to appear in July was not caused by any act or omission on the part of the Government.

The surety's claim of exoneration based upon Judge Cannella's modification of the order to the defendants to report daily to the marshal is equally without merit. Stuyvesant argues that this action by the court enlarged the conditions of bail and enhanced the defendants' chances of absconding; also that it was done without notice to the surety company and without its consent, and, therefore, was not within the absolute terms of its undertaking. The cases which it cites in support of its argument, *United States* v. *Foster*, 278 F. 2d 567 (2 Cir. 1960); *Dudley* v. *United States*, 242

F. 2d 656 (5 Cir. 1957) and *Ewing* v. *United States,* 240 Fed. 241 (6 Cir. 1917) are, at best, only peripherally related to the issue here. More nearly in point is the Supreme Court case cited in *Ewing* at page 254, *Reese* v. *United States,* 76 U. S. 13 (1870). That case is, however, distinguishable from the present case. In *Reese* the condition of the bail bond was that the accused appear at the next regular term of court and at any subsequent term. The Government and the defendant with the approval of the court, but without the knowledge of the surety, stipulated that the case be postponed and that its continuance on the docket be subject to the disposition of two land grant cases then pending in another jurisdiction and that meanwhile the defendant be permitted to leave and remain out of the country. The Court held that this was a change in the contract which discharged the surety.

In the present case, on the other hand, the express conditions of each of the bonds stated in relevant part that "the defendant is to appear . . . at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by . . . the United States District Court for the Southern District of New York . . ." The orders of Judge McGohey and the later modification of them by Judge Cannella clearly come within this provision and it was contemplated by all the parties, including the surety, that such orders might be made. There is nothing in the bonds which call for notice to the surety if any such order or direction is issued, nor was there any enlargement of the limits of the bail.

Stuyvesant claims that the lengthening of the reporting time to once every ten days deprived it of a certain amount of protection because it afforded the accused a longer getaway time. The surety, however, apparently knew of and acquiesced in the change of the interval for reporting, and although more than a month and a half elapsed during which Stuyvesant could have required the defendants to report daily to itself as surety, it did not do so; and if it was really afraid that because of the modification they would abscond, it had plenty of time to pick them up and surrender them, but it did not. 18 U. S. C. §3142; F. R. Crim. P. 46(g). See *Carlson* v. *Landon*, 342 U. S. 524, 547 (1952).

The surety also asserts that the trial court abused its discretion is not discharging it from liability under the bonds. Discretion is vested in the district court with regard to forfeitures of bail bonds, Rule 46(f)(2), F. R. Crim. P. *United States* v. *Agueci*, 379 F. 2d 277 (2 Cir.), *cert. denied* sub nom., *Stuyvesant Ins. Co.* v. *United States*, 389 U. S. 897 (1967); *United States* v. *Accardi*, 241 F. Supp. 119 (S. D. N. Y. 1964), *aff'd* sub nom., *United States* v. *Peerless Ins. Co.*, 343 F. 2d 759 (2 Cir.), *cert. denied*, 382 U. S. 832 (1965); *United Benefit Fire Insurance Co.* v. *United States*, 306 F. 2d 325 (9 Cir. 1962). Under the circumstances of this case we conclude that there was no abuse of discretion. Stuyvesant presented no basis whatever for the trial court to hold "that justice does not reuqire the enforcement of the forfeiture." It has never produced the defendants nor has it said what effort it is making, if any, to find and produce them. Its complaint about Judge Cannella's modification of the order to report to the marshal borders on the frivolous. It lessened rather than increased the bur-

den of the surety and, as an order relating only to the time and place where the defendants were to appear, came within the express condition of the bonds. Moreover, the trial judge was justified in holding that the surety was on notice of the change of time in reporting to the marshal and acquiesced in it. In this connection Stuyvesant complains that the trial judge implied that knowledge of Judge Cannella's order was imputed to the surety because Stuyvesant was later represented by Attorney Stone who represented the defendants. It should be noted that Attorney Stone spoke in court on behalf of Stuyvesant on March 3, 1967 at the hearing before Judge Weinfeld, some time before he filed a formal appearance for the surety. This fact coupled with the other circumstances mentioned by the trial court warranted it in drawing the fairly obvious inference.[6]

The present case arose in part because of the less than satisfactory procedures adopted with respect to the restrictions added by order of the court to the standard form. These were simply typewritten on an unsigned slip of paper stapled to the bond, which did not incorporate them by reference. Restrictions or conditions not within the express conditions of the standard form and changes in the bail limits to places within or beyond the court's own district, should be recited in the body of the bond itself or, if on a separate paper, they should be referred to in the bond as an attached schedule or supplement, or the supplement should describe itself as an amendment to the bond, designated by case name, docket number, name of defendant bonded and date and should be executed and acknowledged

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[6] See *Continental Casualty Company* v. *United States*, 337 F. 2d 602 (1st Cir. 1964).

by the same parties so that the attachment or supplement is an instrument of the same dignity and formality as the bond itself. Likewise, subsequent modifications of the terms of the bond (including a change in bond limits) ordered by the court should be set out in such an attachment or rider or in a newly written bond, executed and acknowledged in the same fashion as the original bond.

Where the court modifies the terms of a bond on its own motion, the clerk of the court should give reasonable notice of the change to the Government, the defendant and the surety in advance of the effective date of the modification in order that the parties may be heard or the surety may take any steps it deems necessary to surrender the defendant to custody. If the Government moves the court for a modification of the terms of the bond, it should give reasonable notice of the motion to the defendant and the surety. If it is the defendant in custody of the surety who moves for a modification of the bail terms, as in the present case, the surety must look to the defendant for notice of the motion or discover it itself from checking the court docket. Regardless of who the movant may be, if the court orders a material modification of the terms of the bond, the defendant must immediately post a new, properly executed bond, or a rider similarly executed for attachment to the old bond, containing the amended conditions. If such an instrument is not filed forthwith, the court must order the defendant held in the custody of the Attorney General until such a bond is furnished.

The judgment of the District Court is affirmed.

SUPREME COURT, U. S.
FILED
OCT 31 1968

In the Supreme Court of the United States

OCTOBER TERM, 1968

STUYVESANT INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 252

STUYVESANT INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States District Court for the Southern District of New York denied petitioner's motion to declare null and void and to set aside the forfeiture of two bail bonds written by petitioner in a criminal case (Pet. App. 1a-4a). On April 24, 1968 the court of appeals affirmed (Pet. App. Supp. 5a-14a). A petition for rehearing en banc was denied on May 29, 1968 (C.A.R. 225-232).[1] Since the motion involved

[1] "C.A.R." refers to the record in the court of appeals.

arose in and was disposed of as an integral part of a criminal proceeding (see Rule 46(f), F. R. Crim. P.), it would appear that the time within which to file a petition for certiorari is that applicable to criminal cases. In that event, the instant petition, filed on July 1, 1968, is out of time under Rule 22-2 of the Rules of this Court. In any event, the issues raised do not warrant further review.

1. Egan and Hill, Australian nationals, were arrested in Miami, Florida, and removed to New York (R.I, 86-95).[2] On January 25, 1967, they were indicted in the Southern District of New York for conspiracy with others to deal in unlawfully imported narcotics in violation of 21 U.S.C. 173 and 174 (R.I, 82-82a). Both defendants, then represented by attorney Stone, pleaded not guilty. Their bail was fixed at $20,000 (R.I, docket sheet A, 97, 98). On February 20, 1967, Hill's bond was reduced to $15,000 and was furnished the following day by petitioner as surety (R.I, 96, 104-106). The bail bond provided that Hill should appear in the district court "and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the commissioner or by the United States District Court" (R.I, 106). The bond also contained restrictions that the defendant should surrender all passports, that he should stay away from transportation centers, that he

[2] "R.I" refers to the record in 67 Cr. 72, and "R.II" to the record in 67 Cr. 196; both records are on file with the Clerk of this Court.

should report to the marshal at 10:30 each morning, and that he should be limited to the Borough of Manhattan (R.I, 106). On March 3, 1967 Egan's bond was reduced to $12,500, and was posted on March 7, again with petitioner as surety (R.I, 100, 108-110). Egan's bond included the same conditions of release as Hill's bond (R.I, 108-110).

On March 17, 1967, a superseding indictment—67 Cr. 196—was filed charging Egan and Hill with the offense previously charged in 67 Cr. 72, but adding ten other defendants (R.II, 79-81). On March 21, 1967, Egan and Hill were arrested by Immigration Service authorities and remained in jail until each was released on a $5,000 bond furnished by petitioner, Egan on March 28, and Hill on April 4 (C.A.R. 213; R.II, 16, 50). On March 23, while they were still in custody, the marshal presented them before Judge Bonsal and they pleaded not guilty to the superseding indictment (R.II, 1, 12). At this March 23 hearing, Hill was represented by Mr. Stone. Since Egan said he then had no attorney, Mr. Stone consented to represent Egan as well so far as this proceeding was concerned (R.II, 7-10). The court ordered bail on the new indictment to be set in the same amount as previously fixed on the earlier indictment, which was marked "off the calendar." The court further ordered that the original bail bonds be written to cover both indictments (R.II, docket sheet B, 3, 24). The following colloquy then occurred (R.II, 29):

> MR. TENDY (government attorney): The bail as to Hill and Egan on the prior indictment, it is agreeable to the government, can be set to cover

both indictments. This will necessitate, I believe, a rewriting of the bail, but this is Mr. Stone's problem.

MR. STONE (defense attorney): I've got too many problems, your Honor.

THE COURT: That is agreeable to you, I take it, Mr. Stone?

MR. STONE: Yes, your Honor.

THE COURT: All right.

However, Egan and Hill, and their attorney, Mr. Stone, never took any steps to have the bonds rewritten.

On April 5, 1967, different counsel filed a notice of appearance for Egan, and Mr. Stone continued to represent Hill (R.II, docket sheet B). On May 22, Judge Cannella granted defendants' motions to have the order, which required them to report to the marshal every day, modified so that instead they could report every ten days (R.II, 191, 197-199). On June 19, Judge Mansfield granted Hill's motion for leave to extend the bail limits to include Mr. Stone's Long Island residence (R.II, 144-148, 210). While the agent of the surety declined to consent to this enlargement of the limits, there is no claim that Hill took advantage of it. The defendants reported to the marshal for the last time on July 10, 1967 (C.A.R. 214). On July 14, when their trial on 67 Cr. 196 was to be held, they failed to appear and bench warrants were issued. On July 20, Judge Bonsal ordered bail forfeited on indictment 67 Cr. 196 (R.II, docket sheet D).

On July 28, 1967, the government moved for forfeiture of bail on indictment 67 Cr. 72 since the bail bond on indictment 67 Cr. 72, it was discovered, had

not been rewritten to cover indictment 67 Cr. 196. After a hearing at which Mr. Stone represented petitioner, Judge Cooper ordered the forfeiture (R.II, 71-78).

2. On August 3, 1967, Mr. Stone, representing petitioner, filed an application for an order to show cause why the bail bonds should not be declared null and void and the government enjoined from obtaining judgment on the basis of forfeiture of the bonds (R.I, 112-121). In a letter dated August 17, 1967, from Mr. Stone to Judge Cooper, Mr. Stone enclosed his memorandum of law stating petitioner's position as to the bond forfeitures, the docket sheets of 67 Cr. 72 and 67 Cr. 196, and the minutes of the proceedings of March 23 and July 28, 1967 (R.I, 141-154). In the letter Mr. Stone stated: "If you desire an evidentiary hearing, I would appreciate it if you advised my office of the time and place so I could subpoena the necessary witnesses" (R.I, 141). Without a hearing Judge Cooper, on November 6, 1967, rendered his opinion denying petitioner's motion to have the forfeiture of the bail bonds declared null and void (Pet. App. 1a-4a).

There was no reason to conduct a hearing at that time. There was no dispute as to the fact of default when bail was ordered forfeited on July 20, 1967.[3] Nor is there any dispute as to the basic facts on which petitioner's claim of non-liability depends—the super-

[3] Judge Cooper's inadvertent statement that the "defendants absconded since June 19, 1967" (Pet. App. 1a), although they did not do so until after July 10, 1967, is thus of no significance.

seding indictment, the failure to rewrite the bonds, and the enlargement of time for reporting.[4] The legal conclusions from those facts did not depend on any testimony which petitioner might produce.

3. No automatic exoneration of the surety resulted when the court agreed to the government's request to have the original indictment marked off the calendar. There was neither "a deposit of cash in the amount of the bond[s] or * * * a timely surrender of the defendant[s] into custody" so as to result in exoneration of the petitioner as surety under Rule 46(g), F.R. Crim. P.[5] The former indictment remained in effect. While the expectation was that Egan and Hill would be tried with the additional defendants added by the superseding indictment, it would have been proper to try them on the earlier indictment. The

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[4] The statement by the court below that "Attorney Stone spoke in Court on behalf of Stuyvesant on March 3, 1967, at a hearing before Judge Weinfield" (C.A.R. 218) is not inaccurate. At that hearing Mr. Stone, although he was representing Hill and Egan and did not expressly state that he was appearing for petitioner, did speak on petitioner's behalf after telling the court how he succeeded in getting Hill out on bail after Hill and Egan had executed an assignment of $12,000 to their Florida attorneys. Mr. Stone stated (R.I, 64-65): "We are still arguing that problem with the attorneys. However, the surety [petitioner] has informed me that even if he had $12,000 collateral, he felt that that would be collateral for Hill for the $15,000 bond, which he hasn't gotten yet, and he certainly wouldn't want to take Egan out on the $15,000 bond, even though he feels Egan is an awfully nice fellow and has been reliable."

[5] Nor, under Rule 46(f), F.R. Crim. P., was there here an abuse of the discretion vested in the district court with regard to forfeitures of bail bonds (see Pet. App. Supp. 12a).

understanding on March 23, 1967, was that the existing bond would be rewritten to cover both indictments. Petitioner's subsequent actions, including its opposition to the enlargement of Hill's bail limits, showed that it considered the bonds in continuing effect even though they had not been rewritten.

4. Nor was petitioner exonerated as surety by reason of Judge Cannella's order of May 22, 1967, modifying the original order in the bonds that the defendants should report to the marshal every day, so as to require that they should report only every ten days. This modification came within the provision of the bonds that the defendants should appear at "such * * * places as * * * [they] may be required to appear, in accordance with * * * all orders * * * by the United States District Court" (R.I, 106, 110). This provision contemplated modifications in the orders of the court (see Pet. App. Supp. 11a). The change in reporting dates was thus not such a change of condition as to release petitioner from its obligation, particularly in the absence of any requirement in the bonds for notice to the surety of any such modifications.

Moreover, the record supports an inference that petitioner in fact knew of the change of condition. Even though petitioner did not execute a written consent to the modification, it was estopped from complaining of the new reporting arrangement since it knowingly acquiesced in it (see Pet. App. Supp. 12a). Almost a month after Judge Cannella's order, petitioner showed that it considered the bonds effective when it refused to consent to Mr. Stone's application

of June 19, 1967, for enlargement of the bail limits to allow Hill to work in Mr. Stone's garden in Long Island (R.I, 117). This was inconsistent with a claim that Judge Cannella's order had exonerated petitioner as surety. If petitioner had actually deemed that, by reason of the modification, it should be released, it had ample time to move for exoneration of its bonds.

5. Finally, the arrest and incarceration of the defendants by the Immigration Service did not constitute government harassment, which might operate to discharge the surety's obligation as a matter of law. Petitioner's obligation was not affected by this incarceration, since after the defendants' release from jail they reported to the marshal many times before they finally disappeared (see Pet. App. Supp. 9a-10a). Petitioner had ample time to surrender them, between their release from jail and the time when they absconded. *United States* v. *Carolina Casualty Insurance Co.*, 237 F.2d 451 (C.A. 7).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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